IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

I. THOMAS KOLODIJ	:	CIVIL ACTION
	:	
v.	:	
	:	
CONSOLIDATED RAIL CO.	:	NO. 97-5620

MEMORANDUM AND ORDER

HUTTON, J. September 23, 1999

Presently before the Court is Defendant's Second Renewed Motion for Summary Judgment (Docket No. 16) and Plaintiff's response thereto (Docket No. 17). For the reasons stated below, the Defendant's Motion for Summary Judgment is **DENIED**.

I. BACKGROUND

In the light most favorable to the Plaintiff, the facts are as follows. Defendant Consolidated Rail Co. ("Conrail" or Defendant) employed Plaintiff, I. Thomas Kolodij, as Director of Financial Information Systems. Defendant terminated Plaintiff effective July 1, 1995, claiming it was necessary as part of a company wide reduction in force and that Plaintiff had the lowest job performance rating compared to other individuals in his department. (See Mehl Decl. ¶ 3-4). Plaintiff, however, has demonstrated that facts exist which may show Defendant's articulated business justification for termination is pretextual, and that the actual reason for termination was the result of age

discrimination and discrimination based upon Plaintiff being "regarded as" disabled due to a heart transplant performed in July of 1986. Prior to Plaintiff's termination, all employment evaluations were satisfactory. However, after Plaintiff's heart transplant there was a marked decline in his evaluation scores as compared to pre-transplant evaluations. Plaintiff brings this suit claiming Defendant terminated his employment in violation of the Age Discrimination in Employment Act ("ADEA"), Americans with Disability Act ("ADA"), and the Pennsylvania Human Relations Act, ("PHRA").

On June 10, 1998, Defendant filed a Motion for Summary Judgment. Plaintiff responded to this motion, but requested additional time to complete discovery. This Court extended the time for discovery on several occasions and denied Defendant's Motion for Summary Judgment, with leave to renew following the close of discovery. Defendant now files this Second Renewed Motion for Summary Judgment.

II. DISCUSSION

The purpose of summary judgment is to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense. See Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmoving party. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

A. Count I & III

Defendant asserts that Plaintiff's claim under the Age Discrimination and Employment Act, fails to state a prima facie case and that summary judgment in the Defendant's favor should be granted. Alternatively, Defendant asserts that even if a prima facia case exists, Plaintiff fails to adduce evidence that Defendant's articulated business reason for termination is pretextual.

In Reduction in Force ADEA cases, the Third Circuit, applies a slightly modified and relaxed version of the McDonnell Douglas scheme. See Showalter v. University of Pittsburgh Med. Ctr., 1999 WL 673349, at *2 (3d Cir. Aug. 31, 1999). First, the Plaintiff must adduce evidence sufficient to convince a reasonable factfinder of all the elements of the prima facie case. Showalter, 1999 WL 673349, at *3. The prima facie case under the ADEA requires the Plaintiff to adduce proof that (1) the Plaintiff was a member of a protected class, (2) the Plaintiff was discharged, (3) the Plaintiff was qualified for the job, and (4) that the retained workers were sufficiently younger to create an inference of age discrimination. See Showalter, 1999 WL 673349, at *3-4.

Second, once the prima facia case is established, then the burden of production shifts to the Defendant to articulate a nondiscriminatory reason for discharge. Third, once the Defendant has shown such nondiscriminatory reason, the Plaintiff has the

burden of production to adduce evidence "from which a factfinder could (1) disbelieve the employers's articulated legitimate reason; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." See Showalter, 1999 WL 673349, at *3 (quoting Fuentes v. Perski, 32 F.3d 759, 763 (3d Cir. 1994)).

In this matter, only the fourth element of the prima facie case is in dispute. Upon considering the appropriateness of summary judgment regarding the ADEA claim, the Court notes that the Plaintiff's complaint asserts allegations that less qualified workers under 40 years of age were assigned to complete Plaintiff's work. (Pl.'s Compl. ¶ 19). Such a statement, if true, would satisfy the fourth prong of Plaintiff's prima facia case. The Third Circuit, however, has held that the opposing party must adduce more than mere allegations. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

Consequently, Plaintiff must adduce evidence to show that a genuine issue of material fact exists with respect to the forth prong of an ADEA prima facie case. Plaintiff's affidavit and deposition continually rely on statements that the retained individuals were not as qualified as he. In Plaintiff's deposition, referring to other individuals who were terminated, he states that "I don't think I saw anyone under 40 years of age. So the people that were with me were over forty." (See Pl.'s Dep. at 32). While

the Plaintiff fails to directly state that the Defendant retained workers which were under forty, when viewing his statement in the light most favorable to the Plaintiff a reasonable jury could determine that this was what was being communicated. Given that Plaintiff was 45 years of age at the time of termination, retaining workers under 40 years of age clearly satisfies the "sufficiently younger" standard. See Showalter, 1999 WL 673349, at *4 (stating that there is no particular difference in age that must be shown, but that a one year difference cannot be sufficient).

Since Plaintiff has circumstantially presented evidence in his deposition that when viewed in a light most favorable to him would allow a reasonable jury to determine an inference of discrimination, the fourth prong of the ADEA prima facie case is satisfied. In addition, the Court cannot agree with Defendant's assertion that even assuming a prima facie case, there is no evidence to rebut a charge that the articulated reason for termination was pretextual. Plaintiff has produced evidence that his job performance was satisfactory and that he was qualified for the job. Additionally, although the termination was allegedly a work force reduction (Mehl Decl. ¶ 3-4), Plaintiff has produced evidence that Defendant was engaged in substantial hiring during this period. (See Pl.'s Mem. of Law in Opp'n to Def.'s Mot. to Dismiss; Pl.'s Ex. B). In the light most favorable to the Plaintiff, sufficient evidence exists that would allow a jury to

determine that Defendant's reason for termination was pretextual.

As such, summary judgment on Count I of Plaintiff's complaint cannot be granted. Further, because claims under the Pennsylvania Human Relations Act, apply the same analysis, summary judgment also cannot be granted on Count III of Plaintiff's complaint. See Connors v. Chrysler Fin. Corp., 160 F.3d 971, 927 (3d Cir. 1998); see also Dici v. Commonwealth of Pennsylvania, 91 F.3d 542 (3d Cir. 1996) (stating generally, the PHRA is applied in accordance with Title VII).

B. Count II & IV

Defendant's assert that Plaintiff's claim under the Americans with Disabilities Act fails to state a prima facie case and that Plaintiff is not a protected individual as defined under the ADA.

A prima facie case under the ADA requires Plaintiff to show that "(1) he is a disable person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination." Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 305 (3d Cir. 1999) (quoting Gaul v. Lucent Tech., 134 F.3d 576, 580 (3d Cir. 1998)). A "qualified individual with a disability" within the meaning of the ADA includes individuals that

are "regarded as having such an impairment." See id.; see also 42 U.S.C. § 12102(2). A person is regarded as having a disability if the person:

> (1) [h]as a physical or mental impairment that does not substantially limit major life activities but is treated by the covered entity as constituting such limitation; (2)[h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3)[h]as [no such impairment] but is treated by a covered entity as having a substantially limiting impairment.

Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 187 (3d Cir. 1999); see also 29 C.F.R. § 1630.2(l)(1999).

In this instant matter, Plaintiff has produced facts which viewed in the light most favorable to him adduces evidence of a material fact that he was regarded by his employer and co-workers as having a substantially limiting disability because of his heart transplant. (Pl.'s Dep. at 27-31, 48-49). Plaintiff states in his affidavit that he was treated differently after his transplant, that following his transplant his performance ratings consistently declined or failed to rise to the level of pre-transplant evaluations, that his current supervisor was aware of Plaintiff's high blood pressure, and that he was terminated following the return from a necessary stress test. (See Pl.'s Aff. at 8, 12, 13, 16-19). As Plaintiff's deposition and affidavit set forth a scenario, which if believed, could allow a jury to determine that

he was targeted as a candidate for discharge based upon the perception of disability, summary judgment is not proper.

Further, Plaintiff makes out a prima facia ADA case based upon the evidence in the record. The evidence adduced shows in the light most favorable to the Plaintiff that he was "regarded as" being disabled within the meaning of the ADA, that he was otherwise qualified to perform the essential functions of his employment, and that it could be determined by a reasonable jury that Plaintiff suffered an adverse employment decision as a result of discrimination.

As such, summary judgment on Count II of Plaintiff's complaint cannot be granted. Further, because any analysis under the ADA "applies equally to a PHRA claim," summary judgment also cannot be granted as to Count IV of Plaintiff's complaint. See Taylor v. Phoenixville School District, 184 F.3d 296, 306 (3d Cir. 1999).

An appropriate Order follows

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O R D E R

AND NOW, this 23rd day of September, 1999, upon consideration of the Defendant's Second Renewed Motion for Summary Judgment (Docket No. 16), and Plaintiff's response thereto (Docket No. 17), IT IS HEREBY ORDERED that the Defendant's Motion is **DENIED**.

BY THE COURT:

_____
HERBERT J. HUTTON, J.